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In the Supreme Court of the United States

October Term, 1978

No. 78-1361

HAROLD D. McCOY,

Petitioner

vs.

BOARD OF DIRECTORS OF LINCOLN INTERMEDIATE UNIT NO. 12,

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

PAGE

Counterstatement of Questions Presented 1

Argument:

I. Petitioner was not deprived of any constitutionally protected property interest and thus has no claim as to which procedural due process applies 2

II. Assuming, arguendo, that Petitioner has been deprived of some property interest, he was not denied due process merely because the Board determined, prior to an adversary hearing, that there was sufficient evidence to warrant a demotion, where a full adversary hearing was held prior to the effective date of the demotion 4

III. Assuming, arguendo, that Petitioner has been deprived of some property interest, he was not denied due process simply because the statute under which he was demoted failed to specifically enumerate the types of conduct which subject one to such action 9

Conclusion 13

TABLE OF CASES

Abington School Board v. Pittenger, 9 Pa. Commonwealth Ct. 62, 305 A.2d 382 1973) 6

Arnett v. Kennedy, 416 U.S. 134 (1974) 5, 11, 12, 13

Board of Regents v. Roth, 408 U.S. 564 (1972) 2, 4

Cafeteria Workers v. McElroy, 367 U.S. 895, 6 L.Ed. 2d 1230 5
Colten v. Kentucky, 407 U.S. 104 (1972) 11, 12
Herzbrun v. Milwaukee County, 504 F.2d 1189 (7th Cir. 1974) 9, 10
Hortonville Joint School District No. 1 v. Hortonville Education Association, 426 U.S. 482 (1976) 3, 5, 7, 8, 13
Meehan v. Macy, 392 F.2d 822 (1968), modified 425 F.2d 469, aff'd en banc 425 F.2d 472 (1969) 12
Michini v. Rizzo, 379 F. Supp. 837 (E.D. Pa. 1974) .. 9
Minnesota ex rel. Pearson v. Probate Court of Ramsey County, 309 U.S. 270 (1948) 10
Morrissey v. Brewer, 408 U.S. 471 (1972) 8
Perry v. Sinderman, 408 U.S. 593 (1972) 2
Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) 13
Shirck v. Thomas, 486 F.2d 691 (1973) 4
Smith v. Darby School District, 388 Pa. 301, 130 A.2d 661 (1957) 3, 9, 10, 11
United States v. Morgan, 313 U.S. 409 (1941) 8
Williams v. Samuel, 332 Pa. 265 (1938) 10
Withrow v. Larkin, 421 U.S. 35 (1975) 6, 7, 8, 13

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Was petitioner deprived of a constitutionally protected property interest so as to give rise to a claim of denial of due process?

II. Assuming, arguendo, that petitioner has been deprived of some property interest, was he denied due process merely because the board determined, prior to an adversary hearing, that there was sufficient evidence to warrant a demotion, where a full adversary hearing was held prior to the effective date of the demotion?

III. Assuming, arguendo, that petitioner was deprived of some property interest, was he denied due process simply because the statute under which he was demoted failed to specifically enumerate the types of conduct which subject one to such action?

ARGUMENT

I. Petitioner Was Not Deprived of any Constitutionally Protected Property Interest and Thus Has No Claim as to Which Procedural Due Process Applies

Petitioner correctly points out to the Court that, as a tenured professional employee, he had an "expectation of continuing employment which established a property right" from which grew certain procedural due process rights (Petition at p. 11). What Petitioner fails to point out is the fact that *he has never been deprived of this expectation.* To the contrary, Petitioner remains to this very day an employee of the Respondent, albeit in a different capacity than he would like.

It is well established that procedural due process applies only to the deprivation of interests encompassed within the Fourteenth Amendment's protection of liberty and property and that the range of such interests is not infinite. *Board of Regents v. Roth,* 408 U.S. 564, 569-70 (1972). In the context of public employment, such protected property interests are created by legislation or contract, or by the employer's actions and course of conduct, as with the de facto tenure system in *Perry v. Sinderman,* 408 U.S. 593 (1972). Throughout the long and arduous proceedings in this case, Petitioner has persistently refused to identify either the nature or the source of the property right which he alleges has been denied.

While the tenure provisions of the Pennsylvania Public School Code, 24 Pa. Stat. Ann. §11-1122, do establish a property right in continued employment generally, they establish no such right with respect to any particular position:

> "The tenure provisions of the School Code do not infringe upon the general power of a school board to assign professional employees to particular classes or particular schools or positions in accordance with its judgment and discretion reasonably exercised. A professional employee, under the tenure provisions of the Code, does not acquire a vested right to teach in any certain class or in any certain school. . . ." *Smith v. Darby School District,* 388 Pa. 301, 306, 130 A.2d 661, 664-65 (1957).

This interpretation by Pennsylvania's highest Court is, of course, binding on this Court. *Hortonville Joint School District No. 1 v. Hortonville Education Association,* 426 U.S. 482, 488 (1976).

Far from granting any substantive right in a particular position, the demotion section, 24 Pa. Stat. Ann. §11-1151, merely provides that there shall be no demotion

> ". . . '. . . without the consent of the employe, or, if such consent is not received, then *such demotion shall be subject to the right to a hearing* before the board of school directors and an appeal in the same manner as . . . in the case of the dismissal of a professional employee." (Emphasis added.)

Obviously, the statute is intended to provide only procedural protection with respect to demotions and has been so interpreted by the Pennsylvania Supreme Court. *Smith, supra,* at 308. The fact that the statute provides for an opportunity for hearing does not, of course, create a prop-

erty right. Such a blurring of the distinction between substantive and procedural due process was properly rejected by Circuit Judge (now U.S. Supreme Court Justice) Stevens in *Shirck v. Thomas,* 486 F.2d 691 (1973), where a non-tenured teacher argued that a requirement that she be given notice of the nonrenewal of her contract created a property interest.

Just as the respondent in *Board of Regents v. Roth, supra,* was found to have absolutely no claim of entitlement to re-employment following the termination of his one-year contract, so, the Petitioner here possessed absolutely no claim of entitlement to his particular position as Director of Special Education. This lack of any constitutionally protected property right is, of course, fatal to Petitioner's claim of denial of constitutional due process.

II. Assuming, Arguendo, That Petitioner Has Been Deprived of Some Property Interest, He Was Not Denied Due Process Merely Because the Board Determined, Prior to an Adversary Hearing, That There Was Sufficient Evidence To Warrant a Demotion, Where a Full Adversary Hearing Was Held Prior to the Effective Date of the Demotion

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Even if the Petitioner was deprived of some, as yet unarticulated property interest, Respondent submits that there was no denial of his due process rights. The statutory procedure set forth in the School Code and scrupulously followed in this case is more than sufficient to meet any constitutional due process requirements.

As Justice Rehnquist observed in *Arnett v. Kennedy,* 416 U.S. 134, at 155 (1974), "due process" is a flexible concept:

> "The types of 'liberty' and 'property' protected by the Due Process Clause vary widely, and what may be required under that clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests.
>
> 'The very nature of due process negates any concept of inflexible procedures applicable to every imaginable situation.' *Cafeteria Workers v. McElroy,* 367 U.S. at 895, 6 L.Ed. 2d 1230."

In determining the nature and amount of "due process" which is required in a particular factual context, this Court has generally attempted to balance the competing interests. *See, e.g., Hortonville Joint School District, supra,* at 494.

On the scale of all possible deprivations, surely the demotion of a public employee from one position to another with no reduction in pay must rank among the most modest of actions, requiring the absolute minimum of due process. Nevertheless, the Petitioner in this case, after being warned repeatedly over a period of nearly one year that his performance was unsatisfactory, was presented with a detailed statement of charges and given a full and formal hearing. Petitioner had, and took, ample opportunity to confront and cross-examine adverse witnesses and to present testimony and witnesses on his own behalf. The Board met twenty-six times and compiled a record of some 3,543 pages. Since the Board's decision, Petitioner has fully exercised his rights of appeal. In sum,

Petitioner has had every opportunity to defend himself and his rights—the very essence of due process.

Faced with this overwhelming deluge of procedural safeguards, Petitioner has retreated to the last and common refuge of disappointed litigants; that is, the claim that the adjudicatory body was somehow "biased" against him, thus depriving him of due process. The alleged basis for this claim is the fact that, prior to the adversary hearing, the Respondent Board determined that there was sufficient evidence to warrant a demotion. Thereafter, the Board so notified the Petitioner and advised him of his right to a hearing. This is precisely the procedure mandated by the School Code and approved by the Pennsylvania Courts:

> ". . . The Board only needed to have passed a resolution that it had sufficient evidence to support its belief, to demote [the appellant] Albrecht by some given date, and therein direct the Secretary and President of the Board to serve notice upon Albrecht of this fact and to advise him of his right to a hearing. . . ." *Abington School Board v. Pittenger,* 9 Pa. Commonwealth Ct. 62, 71, 305 A.2d 382, 387 (1973).

While conceding that *Withrow v. Larkin,* 421 U.S. 35 (1975), would control if the Board had couched its prior determination in terms of "probable cause" (Petition at p. 12), Petitioner never explains why the Board's action here was substantively any different. In fact, the Board's determination amounted to no more than a statement that, absent Petitioner's exercise of his right to a hearing and his presentation of testimony to rebut the charges against him, those charges were sufficient to warrant his demotion. Counsel for Petitioner made this very point in his closing argument to the Board:

> "When the charges were initially presented to you as the Board of Directors, you were not required to hear both sides. All you had to do was to determine whether if everything stated in the Charges was true, the Charges would constitute valid grounds for the recommended action of demotion. Your vote on the initial charges should not make you feel committed to sustaining them now simply to be consistent. This would be a gross miscarriage of justice. Now you have heard both the evidence offered to support the Charges and the evidence presented in defense against the Charges. Your duty is now to reach a decision which is fair, equitable, unbiased and just." (Closing Argument of John D. Killian, Esquire, on behalf of Petitioner, N.T. 3346-3347.)

Moreover, while baldly asserting the "irremedial bias" of the Board (Petition at p. 13), Petitioner, like the appellee in *Withrow, supra,* has presented no evidence to indicate that the impartiality of the Board was actually compromised. This omission is significant in view of the clear and well established presumption of honesty and integrity on the part of those with decision-making power. *Hortonville Joint School District, supra,* at 497. It is also interesting to note that every Board member voted to sustain some charges and dismiss others with the exception of one member who voted to dismiss each and every charge.

Further, while *Withrow* was specifically concerned with possible bias resulting from the combination of investigatory and adjudicatory functions, the holding in that case provides the precise answer to Petitioner's argument:

"The mere exposure to evidence presented in non-adversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing." 421 U.S. at 55.

Finally, *Hortonville Joint School District, supra,* is instructive. There, school teachers terminated for engaging in an illegal strike argued that the school board was biased because of its involvement in the negotiations that preceded and precipitated the striking teachers' discharge. This Court rejected that contention:

> "Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not, however, disqualify a decisionmaker. [Citations omitted]. Nor is a decisionmaker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.' *United States v. Morgan,* 313 U.S. 409, 421 (1941)." *Hortonville Joint School District, supra,* at 493.

The Court further distinguished *Morrissey v. Brewer,* 408 U.S. 471 (1972), cited by Petitioner, as inapplicable to this factual context. See 426 U.S. at 491.

Petitioner has shown nothing to support his bare allegation of the bias and has certainly not overcome the presumption of fairness on the part of the Board. This Court has recently dealt very comprehensively with the bias issue in both *Withrow, supra,* and *Hortonville Joint School District, supra,* and those cases are controlling here.

III. Assuming, Arguendo, That Petitioner Has Been Deprived of Some Property Interest, He Was Not Denied Due Process Simply Because the Statute Under Which He Was Demoted Failed To Specifically Enumerate the Types of Conduct Which Subject One to Such Action

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While Respondent agrees with Petitioner that the statute in question does not specifically enumerate the causes for demotion, it denies that such specific enumeration is either logical or constitutionally required. To the contrary, the Legislature, while so enumerating the causes for termination, specifically intended to allow school boards to exercise wide discretion with respect to employee reassignments and demotions.

> "School authorities must be given broad discretionary powers to ensure a better education for the children of this Commonwealth and any restrictions on the exercise of these powers must be strictly construed on the basis that the public interest predominates and private interests are subordinate thereto. (Citations omitted)." *Smith, supra,* 388 Pa. at 314, 130 A.2d at 668-69.

Moreover, a party whose conduct is so obviously and flagrantly contrary to standards of propriety that any reasonable man would have known or should have known that he was crossing the boundary into prohibitive conduct, may not raise the issue of unconstitutional vagueness. *Herzbrun v. Milwaukee County,* 504 F.2d 1189 (7th Cir. 1974); *Michini v. Rizzo,* 379 F. Supp. 837 (E.D. Pa. 1974). This is particularly so where, as here, there is no

assertion that Petitioner's constitutional rights of speech or assembly have been infringed so as to "chill" the exercise of these rights. *Herzbrun, supra.* It is simply incomprehensible that a man of this Petitioner's intelligence and background could not realize that his insubordinate and disruptive conduct could lead to administrative action by his superiors.

Even if Petitioner has standing to raise the vagueness issue, it is clear that the statute, as interpreted by the Pennsylvania courts, withstands constitutional scrutiny. There is, of course, a strong presumption in favor of the constitutionality of statutes. *Williams v. Samuel,* 332 Pa. 265, 273 (1938). Further, even though the bare statutory language may be vague or uncertain, narrowing construction by state appellate courts may cure any unconstitutional vagueness. *Minnesota ex rel. Pearson v. Probate Court of Ramsey County,* 309 U.S. 270 (1948). For instance, while making it clear that school boards may demote professional employees for any number of reasons, the Pennsylvania Supreme Court in *Smith, supra,* also noted that no such demotion could be made in an arbitrary or discriminatory manner. *Smith, supra,* at 308, 130 A.2d at 666. Further, the Court in *Smith* noted:

> "Time and again our courts have stated that the purpose of the tenure provisions of the School Code is the maintenance of 'an adequate and competent teaching staff, free from political and personal arbitrary interference, whereby capable and competent teachers might feel secure and more efficiently perform their duty of instruction.' (Citations omitted.)" 388 Pa. at 311-312, 130 A.2d at 667-68.

Petitioner assails this use of the "adequate and competent" standard as not applicable to his demotion and as an extension of *Arnett v. Kennedy,* 416 U.S. 134 (1974). Neither contention has merit. While accurately pointing out that the Court in *Smith, supra,* limited the Board's discretion by stating that it must act "intelligently, impartially and with sound discretion" (Petition at p. 15). Petitioner has shown nothing to take the Board's action in this case outside those restrictions. Petitioner also argues that this standard should not be applied to "subjective matters such as insubordination and disloyalty" (Petition at page 17). Since such insubordination and disloyalty obviously interfere with the efficiency of the school system, there is absolutely no reason why such a standard should not apply. Further, in view of the voluminous testimony supporting the findings in this case, it must be said that the "subjectiveness" of Petitioner's conduct exists in his eyes alone.

Finally, Petitioner has totally failed to distinguish *Arnett, supra.* In that case, this Court upheld that provision of the Lloyd-LaFollette Act authorizing the *discharge* of an employee for "such cause as will promote the efficiency of the Service," against an attack based on unconstitutional vagueness and overbreadth. In view of the infinite variety of factual situations which could justify dismissal, the Court found that this adequately described the grounds.

As Justice Rehnquist noted in *Arnett,* supra, at 159, *citing Colton v. Kentucky,* 407 U.S. 104, 110 (1972):

> "The root of the vagueness doctrine is a rough idea of fairness. It is not a principal designed to convert into a constitutional dilemma the practical

> difficulties in drawing [criminal] statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited."

Of particular relevance to this case is the following, also quoted with approval in *Arnett,supra,* at 161:

> " 'We think it is inherent in the employment relationship as a matter of common sense if not common law that an employee in appellant's circumstances cannot reasonably assert a right to keep his job while at the same time he inveighs against his superiors in public with intemperate and defamatory lampoons. We believe that Meehan cannot fairly claim that discharge following an attack like that presented by this record comes as an unfair surprise or is so unexpected and uncertain a to chill his freedom to engage in appropriate speech.' *Meehan v. Macy,* 392 F.2d 822, 835 (1968), modified 425 F.2d 469, aff'd en banc 425 F.2d 472 (1969)."

The Legislature of Pennsylvania did not intend, nor does the United States Constitution require, that a school board be powerless to put its own house in order and to take such reasonable measures as it deems appropriate to insure that its policies will be followed and its instructions carried out, even if reassignment or demotion of personnel is required. The Petitioner in this case clearly knew that his conduct was unacceptable and made a conscious and deliberate decision to continue such conduct in the face of repeated warnings. Even if Petitioner has standing to raise the vagueness issue at all, it is clearly controlled by *Arnett v. Kennedy, supra.*

CONCLUSION

Since Petitioner had no property interest in his position as Director of Special Education, his demotion from that position raises no issue of constitutional due process. Even if some property interest was deprived, Petitioner was extended the full panoply of due process rights. Petitioner has shown nothing to substantiate his claim of bias on the part of the Board or to overcome the presumed constitutionality of the statute involved. Moreover, this Court has rendered a number of recent and comprehensive decisions in this area, including *Hortonville Joint School District, supra; Withrow v. Larkin, supra;* and *Arnett v. Kennedy, supra.* Petitioner has raised no Federal question of substance not heretofore determined nor has he advanced any other "special and important reasons" why this petition should be granted. See, *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70 (1955).

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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